88-1366

Supreme Court, U.S.
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No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WAYNE A. SIMMONS, JAMES NALLS, THOMAS MILLER, MARK MESKE, CITY OF SANTA BARBARA,
Petitioners,

VS.

IRMA JEAN PEREZ,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In determining the lawfulness, under the Fourth Amendment, of a *Payton v. New York* residential search, does a court look to the officer's objective reasonable belief as to the residence of the warrant suspect, measured by the totality of circumstances known to the officer at the time of the search, or does a court apply an actual facts standard?

2. Can a City be held liable under 42 U.S.C. Section 1983 on the theory that the City was grossly negligent in the training or supervision of its police officers?

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

The City of Santa Barbara and the individual defendants (collectively "City"), through the Santa Barbara City Attorney, petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. C) reversing the District Court's judgment is reported at 859 F.2d 1411 (9th Cir. 1988). In an order filed December 21, 1988, the City's Petition for Rehearing was denied. (App. E)

JURISDICTION

The opinion of the court of appeals was filed October 26, 1988. The order denying the City's Petition for Rehearing was filed and entered on December 21, 1988. The

jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the U.S. Constitution provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrant shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

STATEMENT OF THE CASE

On March 8, 1985, four Santa Barbara City police officers entered the apartment of plaintiff Irma Perez, without a search warrant and without her consent, based on their belief that her brother Albert Perez, the subject of two arrest warrants and on probation for drug-related offenses, was a co-resident of the apartment and was in the apartment at that time. (App. C 3-7)

The plaintiff's first amended complaint contained two causes of action. The first cause of action was directed to the four police officer defendants and alleged that they violated her civil rights by unlawfully searching her apartment without her consent or a search warrant, by falsely arresting her for harboring a felon, and by using excessive force to restrain and arrest her. The second cause of action was directed at the City of Santa Barbara and generally alleged that a policy or custom of inadequate training and supervision of the City was a causal factor of her alleged injuries. (App. A)

Mrs. Perez's lawsuit was tried before a jury. At the close of the plaintiff's case in chief, the court granted the City's motion for directed verdict and dismissed the second cause of action against the City of Santa Barbara. The first cause of action went to the jury on a Special Verdict form and, after deliberations, the jury returned a unanimous verdict concluding that the four police officer defendants had not violated any of the plaintiff's civil rights. The jury did not reach the issues of qualified immunity. Judgments were entered for the defendants. (App. B) (The trial court entered three separate judgments for the various defendants. Defendant Meske was separately represented at trial.)

Mrs. Perez appealed that judgment to the court of appeals, arguing that the trial court had erred in instructing the jury concerning the constitutional standards applicable to a residential search. She also challenged the court's grant of a directed verdict on the issue of municipal liability. The court of appeals reversed and remanded on both issues. (App. C)

The principal issue before the court of appeals concerned the jury instruction to be given regarding a warrantless search of an apartment where the subject of an arrest warrant is believed to be living as a co-resident. More specifically, the dispute centered on how to determine whether a location is a suspect's dwelling place or home for Fourth Amendment purposes. The trial court judge gave the following instruction:

> "Under the Fourth Amendment, an arrest warrant is alone sufficient to authorize the entry into a person's home to effect an arrest. If you find that the police officers had reasonable cause to believe that the plaintiff's apartment was inhabited by Albert Perez at the time of the entry and the search, and they had reason to believe that Albert Perez was within the

apartment, then the entry and search were constitutionally valid.

In determining whether a search is reasonable under the Fourth Amendment, an inhabited residence is a place of occupancy, and is not restricted to a person's permanent home."
(App. C 8-9)

The court of appeals concluded that this instruction gave the jury the erroneous impression that a search warrant was not needed if Albert Perez was "temporarily staying" at his sister's apartment as a "guest" (App. C 9, 11) The court of appeals also held that in determining when the location of the suspect is his home for Fourth Amendment purposes, a court must look to the "actual facts". The court of appeals specifically stated that:

"Unless a jury finds that Albert was an actual co-resident of the apartment. . .the search was in violation of Irma Perez's constitutional rights."
(App. C 14).

In the Petition for Rehearing (App. D) the City did not seek reconsideration of the holding that the trial court's definition of a "home" for Fourth Amendment purposes was erroneous. Rather, the Petition questioned the correctness, under the Fourth Amendment, of the "actual facts" probable cause standard that the court of appeals adopted in its opinion and directed be applied on remand. The City argued that an objective reasonable belief test, which considers the totality of circumstances known to the officers *at the time of the search*, is the only proper probable cause standard (App. D 2-8). The court of appeals denied that Petition. (App. E)

REASONS FOR GRANTING THE PETITION

I

The National Significance of this Fourth Amendment Issue Justifies the Court's Intervention at this Stage of the Litigation.

This case provides the Court with the opportunity to clarify its holding in *Payton v. New York*, 445 U.S. 573 (1980), resolve a conflict between circuits, and clearly establish the applicable standard for courts to use in determining when a location is a suspect's home for Fourth Amendment purposes.

The court of appeals stated below that:

> "In this case, we are faced with a situation which falls between *Steagald* and *Payton*. The officers had an arrest warrant for Albert Perez. They could have legally entered his home to seize him. Yet they used it to enter the home of his sister, Irma, on the apparent belief that Albert had been staying there . . .".
> (App. C 10)

In *Steagald v. U.S.*, 451 U.S. 204 (1981), this Court held that absent exigent circumstances or consent, law enforcement officers could not legally search for the subject of an arrest warrant in the home of a third party, without first obtaining a search warrant. One year earlier, in *Payton v. New York*, 445 U.S. 573 (1980) this court stated that:

> "An arrest warrant . . . carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."
> *Id.*, at 603

In neither *Steagald* nor *Payton*, or since, has this Court addressed the issue of what probable cause standard is to be applied with respect to the determination of when a suspect is living in a third party dwelling. In addition, there is the specific question of what "facts" a court looks at in making that determination of when a suspect's location is his dwelling place or home.

The latter legal issue is squarely presented by this lawsuit. A trial has been held, and the record is complete. In the instant case, the officers believed that the arrest warrant suspect, Albert Perez was living in, or staying at, his sister's apartment as a co-resident. (App. C 3-6) The court of appeals has held, however, that on remand probable cause is not to be determined on the officers objective reasonable belief as to the residence of Albert Perez at the time of the search, but on what are determined afterward to have been the "actual facts". (App. C 14)

A. The Issue's National Significance

This question deserves immediate attention because of its national importance. The issue arises each day in the federal and state courts of this land: In the criminal courts, the issue arises at suppression hearings. In civil damages cases it arises when it is alleged that law enforcement officers have violated a plaintiff's civil rights because they did not have probable cause to believe that the subject of the arrest warrant resided at the home that they searched. Each day criminal and civil courts are faced with the issue: was the third party residence searched pursuant to an arrest warrant, and without the benefit of a search warrant, also the dwelling place or home of the arrest warrant suspect? Stated in other terms, was the warrant suspect a "co-resident" for Fourth Amendment purposes?

In *Arkansas v. Sanders*, 442 U.S. 753, 758 (1979) this Court recognized that although the general principles applicable to claims of Fourth Amendment violations are well settled, litigation to suppress relevant evidence continues to occupy a great deal of the time of both the federal and state judiciary. Although this often occurs because of the difficulty of applying those Fourth Amendment principles to the facts in individual cases, it may occur because the principle is unclear. This is such a case. Two courts of appeal have reached opposite results using the same language from this Court's opinion in *Payton*. Unless that conflict is corrected, by a clarification of the Fourth Amendment probable cause test required by *Payton* and *Steagald*, suppression motions and cases will be wrongfully decided, with untold and irreversible damage to the parties affected.

B. There Is a Conflict Between the Circuits On This Issue

The Ninth Circuit's opinion in this case conflicts with the rule applied in another circuit, and with the most respected constitutional scholars.

In the case of *U.S. v. DeParias*, 805 F.2d 1447 (11th Cir. 1986), the Eleventh Circuit was confronted with the issue of whether the search of a third party's home for arrest warrant suspects violated the third party's Fourth Amendment rights. That circuit applied a reasonable belief, not actual facts, probable cause test and held that the third party's rights were not violated where the officers reasonably believed that the defendants resided in the home *and* were there at the time of search. *Id.*, at 1457.

The nation's leading scholar and commentator on Fourth Amendment search and seizure issues has argued for the probable cause standard followed by the Eleventh

Circuit in *DeParias*; and advocated by this Petition. In his treatise, Professor LaFave exhaustively examined the *Steagald* and *Payton* decisions, and the numerous issues raised by those opinions. He has specifically stated, with reference to the particular issue raised by this Petition, that:

> "With *Payton* requiring an arrest warrant for "entry into a suspect's home" to arrest and *Steagald* requiring a search warrant where the arrest entry is at "the home of a third party", doubtless there will sometimes arise the question of which situation obtains in a particular case . . . when this issue is raised on a subsequent motion to suppress, objecting that a search warrant rather than an arrest warrant was required, surely it ought not be resolved on the basis of information *then* available showing the premises entered were not *in fact* the residence of the person sought to be arrested. Rather, in such circumstances the matter to be decided is whether the entering officers reasonably believed that the place entered was the residence of the person named in the arrest warrant, for were it otherwise the police would be caught in an incredible Catch 22 situation."

LaFave, *Search and Seizure*, (2d Ed.) Section 6.1(b), pages 577-578.

C. *Payton v. New York* Needs to Be Clarified

The problem presented by this petition stems from language in *Payton v. New York*, 445 U.S. 573 (1980) that needs to be clarified. Therein, this Court stated that:

> "An arrest warrant carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within". *Id.*, at 603

Since the "reason to believe" language above expressly refers only to whether the suspect is within the dwelling, and not to whether the suspect lives there, the Ninth Circuit concluded that *Payton* requires an actual facts probable cause test on the issue of residence. As the court of appeals stated:

> "*Payton* allows entry into the suspects *actual* home to execute an arrest warrant for the suspect. *See Payton,* 445 U.S. at 603 . . ."
> (App. C 11)

> ". . . if Albert did not actually reside in the apartment, the search was illegal under *Steagald*".
> (App. C 10)

It is the City's submission that the absence of "reason to believe" language in *Payton v. New York* did not impose an adoption by this Court of a post-search, "actual facts" test of whether the place where an arrest warrant suspect is found is his "home". If the City's submission is correct, then this Petition offers this Court the important opportunity to clarify this issue and resolve the conflict between the circuits.

II

THIS COURT HAS TRADITIONALLY APPLIED A TOTALITY OF CIRCUMSTANCES, OBJECTIVE REASONABLE BELIEF TEST TO FOURTH AMENDMENT SEARCH & SEIZURE ISSUES.

In numerous context with respect to probable cause issues, this Court has looked to the totality of circumstances and objective reasonable belief of the law enforcement officer at the time of the event, not thereafter. This is true with respect to the probable cause necessary for a search warrant based on information from an informant, *see Illinois v. Gates*, 426 U.S. 213 (1983); the validity of a

search, pursuant to an over broad search warrant, of the wrong apartment, *see Maryland v. Garrison*, 107 S.Ct. 1013 (1987); the probable cause necessary for a misdemeanor arrest, *see Michigan v. DeFillippo*, 443 U.S. 1, 36 (1979); and the validity of the arrest, without a warrant, of the wrong individual, *Hill v. California*, 401 U.S. 797 (1971). Similarly, in suppression hearing cases involving the search of automobiles and luggage, where the issue is whether the exigent circumstances exception to the Fourth Amendment warrant requirement is applicable, this Court has held that the existence of exigent circumstances must be assessed at the point immediately before the search. *See U.S. v. Chadwick,* 433 U.S. 1, 13 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 764 (1979).

This Court has also adopted a totality of circumstances test to Fourth Amendment seizure issues, such as the use of deadly force. *See Tennessee v. Garner,* 471 U.S. 1 (1984).

It is the City's submission that this same reasonable belief test should apply to residential searches under *Payton* and *Steagald.*

III

AT A MINIMUM, THIS PETITION SHOULD BE HELD BECAUSE OF PENDING CASES RAISING SIMILAR QUESTIONS UNDER 42 U.S.C. SECTION 1983.

The second question presented by this Petition raises the issue of whether a City can be held liable under 42 U.S.C. Section 1983 on the theory that the City was grossly negligent in the training and supervision of its officers. Related issues are presently pending before this Court in the cases of *City of Canton v. Harris*, #86-1088

and *DeShaney v. Winnebago County Department of Social Services*, #87-154.

Accordingly, the City would request that this Court hold this Petition, as to the second question, until such time as decisions are rendered in *Canton* and *DeShaney*. *See generally Keney v. New York*, 388 U.S. 440 (1967).

IV

CONCLUSION

The City respectfully asks this Court to grant the Petition as to the Fourth Amendment question presented, or in the alternative, to hold this Petition until decisions are rendered in *City of Canton v. Harris*, #86-1088 and *DeShaney v. Winnebago County*, #87-154.

Respectfully submitted,

STEVEN A. AMERIKANER,
City Attorney

By: DAVID K. HUGHES,
Assistant City Attorney

APPENDIX A

APPENDIX A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83 7492 KN (Kx)
AMENDED COMPLAINT FOR
VIOLATION OF FEDERAL
CIVIL RIGHTS
42 U.S.C. §§ 1983 and 1988

PLAINTIFF'S JURY DEMAND

IRMA JEAN PEREZ,
Plaintiff,

VS.

WAYNE A. SIMMONS; JAMES NALLS;
THOMAS MILLER; MARK MESKE; AND
THE CITY OF SANTA BARBARA,
Defendants.

Plaintiff alleges:

First Cause of Action
(Against Defendants Simmons, Nalls, Miller and Meske)

1. At all times mentioned, plaintiff was and now is a citizen of the United States, residing in the County of Santa Barbara, in the State of California.

2. This is an action at law for money damages brought under 42 U.S.C. §§ 1983 and 1988 to redress a deprivation under color of state law of rights, privileges and immuni-

ties secured to plaintiff by said statutes and by the First, Fourth, Eighth and Fourteenth Amendments of the United States Constitution. The jurisdiction of this Court is invoked under said statutes and amendments and under 27 U.S.C. §§ 1343 and 1331.

3. At all times herein mentioned, defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske, and each of them, were duly appointed and acting police officers employed as such by the City of Santa Barbara, State of California, and were acting under color of state law, in concert, unlawfully and to the injury of plaintiff as hereinafter alleged.

4. The events, acts and omissions herein complained of occurred on or about March 8, 1983, commencing at approximately 1:00 p.m., at 13 South Soledad Street, Apt. 3, Santa Barbara, California, where plaintiff was in her home, peacefully minding her own business.

5. At said place and time, defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske knowingly and willfully deprived plaintiff of the *rights of speech and privacy, of security in her home and person* from unreasonable search and seizure and unjustified force and bodily injury; *freedom from false arrest and imprisonment; freedom from cruel and unusual punishment; and the right to due process of law,* guaranteed by the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution, by entering plaintiff's home by force and violence; by forcibly preventing her from telephoning the police department for assistance and protection; by assaulting, beating and handcuffing plaintiff with excessive force; by searching and disrupting her home; by calling plaintiff an unfit mother in the presence of her 5-year-old daughter and threatening to take her daughter away from her; by telling her she was under arrest for assaulting an officer (a charge later

changed to another alleged violation, and then dropped); by taking her with unnecessary force and violence and in handcuffs, not to the county jail for immediate booking, but to the Santa Barbara Police Department for questioning; and after humiliating and painful delay, taking her, again in handcuffs, to the county jail, and booking her on the charge of harboring a felon, which charge, though unfounded, tended to cover up and seemingly justify said defendants' assault upon plaintiff while diminishing the credibility of plaintiff's complaint that illegal force had been used upon her and her house illegally entered. When plaintiff was required to and did appear in court for arraignment on this charge, on about March 18, 1983, there was no complaint on file against her, it appearing (as plaintiff is informed and believes) that said defendants were afraid to file the charge and subject it to the scrutiny of the Santa Barbara County District Attorney's Office, or that they did so, and the District Attorney rejected it, although not until after plaintiff had been subjected to substantial risk, humiliation and damages, as set forth below.

6. As a direct and proximate result of said acts of said defendants, and each of them, plaintiff suffered great physical and mental pain, shock to her nervous system and body, anguish, torment, anxiety, humiliation, severe depression and emotional distress, all of which injuries have caused and continue to cause plaintiff great mental, physical and nervous pain and suffering. Plaintiff is informed and believes, and on that ground alleges, that these injuries will result in some permanent disability to plaintiff, all to her general damage in the sum of $300,000.

7. As a further proximate result of said acts of said defendants, and each of them, plaintiff was required to and *did employ a doctor to treat and care for her, and incurred medical and incidental expenses.* Plaintiff is in-

formed and believes, and on that ground alleges, that as a further proximate result of said acts of defendants, she will be required to incur further such expenses in the future. The exact amount of such expense is unknown to plaintiff at this time.

8. Said acts of defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske were committed by them knowingly, willfully and maliciously, with the intent to vex, annoy, harass and oppress plaintiff and to cause her physical and mental injury and suffering and the loss of her aforesaid constitutional rights; and by reason thereof, plaintiff requests that said defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske be required to pay damages by way of example and punishment in an amount not to exceed $500,000.

9. By reason of said acts of said defendants, plaintiff was required to retain a lawyer to institute and prosecute this action, and to render legal assistance to plaintiff in vindicating the loss and impairments of her rights as set forth above; by reason thereof, plaintiff requests payment by said defendants of a reasonable sum for attorney fees pursuant to 42 U.S.C. § 1988.

Second Cause of Action
(Against Defendant the City of Santa Barbara)

1. Plaintiff here refers to Paragraphs 1 to 5, inclusive, of her foregoing first cause of action and incorporates the same herein by reference as if here set forth in full.

2. At all times herein mentioned, defendant the City of Santa Barbara was, and is, a charter city of the State of California, and had the authority to investigate, test, evaluate, employ, train, supervise, discipline, assign and discharge sworn personnel of the Santa Barbara Police

Department, including defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske.

3. At and before the events alleged in this complaint, the governmental *policies and customs* of said City with respect to the operation of the Santa Barbara Police Department included the following:

a. In deciding whether to hire a person applying for employment as a police officer:

(i) Not to obtain from the applicant or from other law enforcement agencies which had previously employed the applicant as an officer information regarding complaints against the applicant for allegedly making unlawful, forcible and warrantless entries of residential premises, for making unlawful arrests in connection with such illegal entries or searches, or for using unprovoked, unnecessary or excessive violence; if such data was received, to make no meaningful examination or evaluation of it, and to make no independent inquiry concerning the facts underlying any such complaints; and,

(ii) To refrain from administering psychological tests of sufficient efficacy to screen out applicants having a propensity for unprovoked, unnecessary or excessive violence; and not to require any special psychological testing or counseling for any applicant who had accumulated a significant number of such complaints within a particular time period, regardless of whether such complaints were classified by the previous employer as substantiated.

b. In supervising, training or assigning duties to a person employed as a police officer:

(i) With respect to officers against whom complaints were made in their prior or current employment for allegedly making unlawful, forcible and

warrantless entries of residential premises, for making unlawful arrests in connection with such illegal searches, or for using unnecessary force in making arrests, not to require special training, testing, supervisory attention, reports and reevaluations of job performance regarding illegal searches, improper arrests or use of force;

(ii) To permit Santa Barbara police officers to search private residences by forcible entry and without a warrant, in the absence of exigent circumstances and where a warrant could be sought, on the sole ground that the officers were looking for a person for whom a felony warrant had been or was believed to have been issued, where the person sought did not reside at the premises to be searched, and where the officers had not verified the presence of such person on said premises at the time of the search;

(iii) Not to make any meaningful investigation of complaints against Santa Barbara police officers alleging the warrantless, forcible, unlawful searching of private homes; unlawful arrests; or unnecessary force in making such arrests, and not to rebuke or discipline officers for doing those things, so long as such actions resulted in the discovery of information or evidence which, in the opinion of the Santa Barbara Police Department, "incriminated" someone;

(iv) With respect to written police reports reflecting the entry of private homes by police officers without search warrants, to make no meaningful inquiry or follow- up investigation to determine: whether such entry was made over the objection or protest of the homeowner or occupant(s), or made under exigent circumstances justifying a warrantless search; and whether the officers involved needed

further training or retraining concerning constitutional provisions and other rules requiring warrants and exigent circumstances justifying warrantless searches;

(v) To refrain from indoctrinating Santa Barbara police officers to report promptly and fully any instances of unlawful, forcible, warrantless searches of homes, false arrest or unnecessary use of force by fellow officers, and to refrain from providing police officers with written guidelines or policy statements requiring them to do so, but instead to countenance and tacitly to encourage the non-reporting of such incidents;

(vi) Not to train or indoctrinate officers to intervene forcibly to prevent the violation of California Penal Code Section 149 by a fellow officer against a person being searched, interviewed, detained or arrested by such officer;

(vii) Not to train or indoctrinate Santa Barbara police officers to intervene forcibly to prevent the unlawful, forcible, warrantless search of a private home in contravention of the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983;

(viii) To refrain from providing Santa Barbara police officers with written guidelines or policy statements, and to refrain from formulating and advising officers of any departmental policy concerning the warrantless entry or search of a private residence over the objection of the homeowner or other occupant, constitutional provisions and other rules concerning warrants, and exigent circumstances justifying warrantless searches; and,

(ix) To refrain from providing Santa Barbara police officers adequate training or retraining concerning the warrantless, forcible search of a private residence over the objection of the homeowner or other occupant, particularly concerning exigent circumstances justifying a warrantless search, and constitutional provisions and other rules requiring warrants.

4. As a proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske, and each of them, were hired and continued to be employed and assigned to duties as police officers by said City on and prior to March 8, 1983, despite, as plaintiff is informed and believes and upon that ground states, incidents and complaints of illegal residential searches, false arrests and unnecessary force on the part of each of them in their prior employment as law enforcement officers or during their employment as Santa Barbara police officers. As a further proximate result of said governmental policies and customs, and each of them, the inquiries, tests, investigations and supervisorial evaluations, each of which would routinely have detected such propensities and led to their correction or to the reassignment or termination of employment of said officers, did not occur; said officers were not provided with written guidelines concerning residential searches or warrantless entries, trained, retrained, reassigned or inhibited in any way from imposing said search, arrest and unnecessary force and violence on plaintiff; said officers were permitted and encouraged, tacitly or overtly, to make warrantless searches of private residences, by force, or over the objection of the homeowner or other occupant, in accordance with their own discretion or impulse in searching for persons for whom an arrest warrant had been issued

or was believed to have been issued, and to retaliate against an objecting homeowner or other occupant by unfounded arrest and unnecessary violence; and plaintiff suffered and sustained all of the damages and injuries hereinbelow set forth.

5. As a further direct and proximate result of such governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff Irma Perez suffered the forcible, unlawful, warrantless search of her home over her objections, the disruption of her household, was prevented from summoning police assistance, was physically restrained in her house, and then unlawfully arrested, handcuffed, threatened, insulted, humiliated, falsely imprisoned and subjected to a pointless and illegal criminal prosecution, and sustained the damages and injuries hereinbelow set forth.

6. As a direct and proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff suffered great physical and mental pain, shock to her nervous system and body, anguish, torment, anxiety, humiliation, severe depression and emotional distress, all of which injuries have caused and continue to cause plaintiff great mental and physical pain and suffering. Plaintiff is informed and believes, and upon that ground alleges, that these injuries will result in some permanent disability of plaintiff, all to her general damage in the sum of $300,000.

7. As a further proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff was required to and did employ a doctor to treat and care for her, and incurred medical and incidental expenses. Plaintiff is informed and believes, and upon that ground alleges, that as a further proximate result of said governmental policies and customs of defendant the City of Santa Barbara,

and each of them, she will be required to incur further such expenses in the future. The exact amount of such expense is unknown to plaintiff at this time.

8. As a further direct and proximate result of said governmental policies and customs of defendant the City of Santa Barbara, and each of them, plaintiff was required to retain a lawyer to institute and prosecute this action, and to render legal assistance to plaintiff in vindicating the loss and impairment of her rights as set forth above; by reason thereof, plaintiff requests payment by said defendant of a reasonable sum for attorney fees pursuant to 42 U.S.C. § 1988.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. For general damages in the amount of $300,000;

2. Doctor, medical, x-ray, pharmaceutical and incidental expenses as proved;

3. Punitive and exemplary damages, against defendants Wayne A. Simmons, James Nalls, Thomas Miller and Mark Meske only, in an amount not to exceed $500,000;

4. Reasonable attorney fees under 42 U.S.C. § 1988;

5. For her costs of suit herein; and,

6. For such other, further or different relief as to the Court seems proper.

DATED: February 16, 1984.

JOHN M. SINK, Lawyer for Plaintiff

PLAINTIFF'S JURY DEMAND

Plaintiff hereby demands a trial by jury with respect to all counts.

Dated: February 16, 1984.

JOHN M. SINK, Lawyer for Plaintiff

APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. 84-7492 JGD

JUDGMENT

IRMA JEAN PEREZ,
Plaintiff,

vs.

WAYNE A. SIMMONS, et al.,
Defendants.

Filed: September 29, 1986

This action came on for trial before the court and a jury, the Honorable John G. Davies, district judge, presiding. At the close of the plaintiff's case, defendant City of Santa Barbara moved for a directed verdict as to the claim against defendant City of Santa Barbara contained in plaintiff's second cause of action. Good cause appearing therefor,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action against the defendant City of Santa Barbara be dismissed on the merits, and that the

defendant City of Santa Barbara recover of the plaintiff its costs of action.

Dated at Los Angeles, California, this 29th day of September, 1986.

JOHN G. DAVIES
U.S. District Judge

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DAVID K. HUGHES
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UNITED STATES DISTRICT COURT
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IRMA JEAN PEREZ,
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WAYNE A. SIMMONS, et al.,
Defendants.

Filed: September 29, 1986

This action came on for trial before the court and a jury, the Honorable John G. Davies, District Judge presiding. The issues having been duly tried on the plaintiff's first cause of action, and the jury have duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants Simmons, Nalls, Miller and Meske recover of the plaintiff their costs in this action.

Dated at Los Angeles, California, this 29th day of September, 1986.

JOHN G. DAVIES
U.S. District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NO. 83-7492 JGD

JUDGMENT

IRMA JEAN PEREZ,
Plaintiff,

vs.

WAYNE A. SIMMONS, et al.,
Defendants.

Filed: September 29, 1986

This action came on for trial before the Court and Jury, the Honorable John G. Davies, District Judge, presiding. The issues having been duly tried on the Plaintiff's First Cause of Action, and the Jury have duly rendered its Verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that Defendant, MARK MESKE, recover of the Plaintiff his costs in this action.

Dated at Los Angeles, California, this 29th day of September, 1986.

JOHN G. DAVIES
U.S. District Judge

APPENDIX C

IRMA JEAN PEREZ,
Plaintiff-Appellant,

v.

WAYNE A. SIMMONS; JAMES NALLS; THOMAS MILLER; MARK MESKE; and CITY OF SANTA BARBARA,
Defendants-Appellees.

No. 86-6663.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 7, 1988.
Decided Oct. 26, 1988.

Apartment resident brought civil rights action against city and police offices who searched the apartment for person for whom they had an arrest warrant. The United States District Court for the Central District of California, John G. Davies, J., directed verdict in favor of city and entered judgment on jury verdict in favor of police officers, and apartment resident appealed. The Court of Appeals, Hug, Circuit Judge, held that: (1) police did not have the right to enter apartment to execute arrest warrant merely because the subject of the warrant sometimes stayed in the apartment, and (2) apartment resident presented sufficient evidence from which liability of city could be established.

Reversed and remanded.

1. Arrest 68.5(6)

If person whom police sought to arrest had been an actual coresident in apartment, search based on arrest warrant would have been legal, as arrest warrant would have authorized entry into the suspect's home even if it was shared by others but, if arrestee did not actually reside in the apartment, search of the apartment based on the warrant was illegal.

2. Searches and Seizures 25

For purposes of determining the Fourth Amendment rights of a homeowner, a dwelling is not to be considered the home of everyone who happens to be staying there. U.S.C.A. Const.Amend. 4.

3. Arrest 68.5(1)

For purposes of determing apartment resident's Fourth Amendment rights with respect to entry by police officers, her residence could not be considered the home of person who the police sought to arrest if he did not permanently reside there. U.S.C.A. Const.Amend. 4.

4. Civil Rights 13.7

City may be held liable under federal civil rights statute for constitutional violations by its police officers only if the violation results from a municipal policy or custom. 42 U.S.C.A. § 1983.

5. Civil Rights 13.7

To establish municipal civil rights liability, plaintiff must not only establish gross negligence in training but also must demonstrate an affirmative causal link between the inadequate training and the constitutional deprivation. 42 U.S.C.A. § 1983.

6. Civil Rights 13.13(3)

Finding of municipal liability for search of apartment could be supported by evidence that city had no written guidelines on searching a third person's home for a suspect and testimony of officers that, as a result of their training and indoctrination as to police department policy, they believed that the search of a third party's home was legal if the subject of an arrest warrant was temporarily staying at the residence. 42 U.S.C.A. § 1983.

John M. Sink, Santa Barbara, Cal., for plaintiff-appellant.

David K. Hughes, Asst. City Atty., and Kristofer Kallman, Santa Barbara, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before HUG, ALARCON and KOZINSKI, Circuit Judges.

HUG, Circuit Judge:

Plaintiff Irma Perez brought this section 1983 action against the City of Santa Barbara and certain police officers alleging that the officers violated her constitutional rights by entering her house unlawfully in search of her brother. The district judge granted a directed verdict in favor of the City, and a jury found in favor of the remaining defendants. In this appeal, Perez alleges error in the jury instructions and error in granting the directed verdict. We have jurisdiction under 28 U.S.C. § 1291 (1982). We reverse.

FACTS

On March 8, 1983, Irma Perez was living in a three-bedroom apartment at 13 South Soledad Street, in Santa Barbara, California. She had lived there over three years with her children.

Irma Perez had a brother named Albert who, Irma testified, never lived in her apartment. Albert was on probation and also had warrants outstanding for his arrest. Officers Nalls, Simmons, and Miller of the Santa Barbara Police Department narcotics detail were aware of the arrest warrants. Between October and December of 1982, the officers went three or four times to the residence of Albert's other sister, Debbie, to contact Albert. Debbie

lived across town from Irma on Bath Street. This was the residence address that Albert had given to the police when he was arrested on August 21, 1982, and this was the address used by the probation department. When the officers spoke with Debbie on those occasions, they informed her of the warrants for Albert's arrest. She informed them that Albert was not residing there any longer and she did not know where he was living.

In the early afternoon of March 8, 1983, the three officers were driving in an unmarked vehicle on Carpinteria Street and approached the intersection of South Soledad Street. They spotted Albert Perez walking toward them on Soledad Street, in the same block where Irma Perez lived in the apartment complex. When Albert saw them, he immediately turned and headed in the direction of the apartment. Detective Miller got out of the car while the others drove to a parking place. The three then walked through the apartment complex but saw no trace of Albert.

Sergeant Nalls then recalled that he had participated in an arrest of Albert Perez in July of 1980 on Soledad Street in front of the same complex. He further recalled that, at that time, a relative of Albert's named Irma Perez was living in the complex, but he could not remember which apartment she lived in. Additionally, Detective Miller remembered that in early 1982, he had talked to Albert in this area. At that time, Albert said he was residing at the complex (according to Detective Miller's testimony).

Not knowing which apartment Irma Perez lived in, the three officers radioed the police dispatcher, asking for the address that was marked on Albert Perez's 1980 arrest report. Because the dispatcher was unable to assist, the officers drove to a nearby telephone and called the Santa Barbara Sheriff's narcotics detail to obtain the address.

Simmons was told that the address was apartment number 3 at 13 South Soledad Street. While driving back to the apartment complex, a detective's message came over the radio. Sergeant Nalls testified that he interpreted the detective to have said that Albert lived in Apt. 3.[1] When the officers asked the dispatcher to cross-index the address, the dispatcher informed them that Irma Perez lived at apartment 3.

The officers planned to search the apartment and radioed for assistance from a uniformed officer. As they were waiting for the backup car, Detective Miller observed a Mr. William Roberts exit the complex. Detectives Miller and Simmons knew Roberts, since they previously had arrested him. Detective Miller approached Roberts and asked which apartment Albert Perez lived in. According to Detective Miller's testimony, Roberts responded that Albert lived in Apt. 3, and when asked if that was Irma's apartment, Roberts responded that it was. Detective Miller also testified that he asked Roberts if he had seen Albert recently, and Roberts replied that he had not. Roberts' testimony conflicted with Miller's; Roberts testified that he told the officers Albert did not live there, but that he had seen Albert walking down the street five or ten minutes earlier.

When the uniformed police officer — Officer Meske — arrived, all four officers went to Apt. 3 intending to apprehend Albert, though they had no arrest warrants with them. Detective Simmons' testimony at trial indicated that the officers believed Albert was staying at Irma's apartment. Sergeant Nalls testified that he did not check with any city agency to determine whether

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[1]The conversation was recorded on a dispatcher tape; however, the tape is muffled and does not clearly reveal the detective's precise words.

the apartment was listed to anyone in addition to Irma Perez. Indeed, the defendants do not now claim that any such check was made. Sergeant Nalls testified at trial that the idea of obtaining a search warrant to search Irma Perez's apartment "just didn't occur to [him]."

Sergeant Nalls went to the rear of the apartment, and the other three officers went to the front door, knocked, and stated that they were police officers looking for Albert Perez, that they believed he was in the apartment, and that they had a warrant for his arrest. They then requested consent to search. Detective Miller testified that Irma Perez opened the door and stated that Albert was not there, did not live there, and had never lived there. She demanded to see the arrest warrant. When the officers failed to produce it, she refused to consent to a search and began closing the door. At that point, Detectives Simmons and Miller shoved open the door and all of the officers entered.

The three plainclothes officers went upstairs and Officer Meske stayed downstairs. Irma Perez testified that after some conversation between her and Officer Meske, Officer Meske grabbed her from behind, threw her into a wooden rocking chair, and pinned her down with one knee on her leg and both of his hands on both of her wrists. She further testified that after approximately 30 seconds he let her up.

The officers did not find Albert Perez in the apartment. When the officers were on their way out of the apartment, Irma went to the telephone in the kitchen and dialed 911. She told the dispatcher that she wanted to "speak to somebody about policemen harassing me. . . ." The dispatcher told her to call the non-emergency number for the police. When she was about to make a second call, one of the officers cut off the call by depressing the receiver. Perez testified that she threw the telephone to the floor in

anger. She was then spun around, thrown against the wall, handcuffed and told she was under arrest for harboring a fugitive.

Perez testified that she was led out the door in front of gathering neighbors to the police car, and was thrown into the vehicle with such force that her right shoulder slammed against the door frame, causing her pain. Irma was first taken to the Santa Barbara police station, and then to jail. She was released after posting $250 bail. The district attorney declined to prosecute her.

Perez brought this action under 42 U.S.C. § 1983 against the City of Santa Barbara and the four officers who entered her house. She claimed that the officers violated her civil rights by: (1) unlawfully searching her apartment without her consent or a search warrant; (2) falsely arresting her for harboring a fugitive; (3) using excessive force against her prior to and during the arrest; and (4) depriving her of her rights to free speech by preventing her from making the second phone call to the police and by arresting her in retaliation for insulting comments she directed at them. Her first cause of action was against the four police officers, and her second cause of action was against the City on a theory of municipal liability.

The case was tried before a jury. Upon conclusion of Perez's case-in-chief, the court granted the City's motion for a directed verdict and dismissed the second cause of action. The first cause of action was sent to the jury. The jury was provided a special verdict form which segregated issues of qualified immunity from issues of whether Perez's constitutional rights were violated. The jury unanimously found that the police officers did not violate any of Perez's constitutional rights; thus, they failed to reach any issues of qualified immunity.

On appeal, Perez challenges several of the jury instructions. Because we find reversible error in the instructions pertaining to the entry and search of her home, we need not address whether the other instructions were proper. We also conclude that the directed verdict in favor of the City was granted in error.

Jury Instructions[2]

We must determine "whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to ensure that the jury fully understood the issues." *Los Angeles Memorial Coliseum Comm. v. Nat'l Football League*, 726 F.2d 1381, 1398 (9th Cir.), *cert denied*, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984). The trial court has broad discretion in formulating instructions and will be reversed only upon a showing of an abuse of discretion. *United States v. Wellington*, 754 F.2d 1457, 1463 (9th Cir.), *cert. denied*, 474 U.S. 1032, 106 S.Ct. 593, 88 L.Ed.2d 573 (1985).

The trial judge gave the following instructions to the jury on the issue of whether the officers violated Perez's constitutional rights by forcibly entering into and searching her residence:

> Under the Fourth Amendment, an arrest warrant is alone sufficient to authorize the entry into a person's home to effect an arrest. If you find that the police officers had reasonable cause to believe that the plaintiff's apartment was *inhabitated by Albert Perez* at the time of the entry and the search, and

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[2]The defendants argue that Perez has waived her right to challenge the instructions, contending that she failed to object to the instructions with sufficient specificity. *See* Fed.R.Civ.P 51. We find that her objections were adequately specific to meet the requirements of Rule 51.

they had reason to believe that Albert Perez was within the apartment, then the entry and search were constitutionally valid.

In determining whether a search is reasonable under the Fourth Amendment, *an inhabited residence is a place of occupancy, and is not restricted to a person's permanent home.*

(Emphasis added.)

The difficulty we have with the instruction lies in the definition of an inhabited residence as merely a place of occupancy. This leaves the jury with the understanding that any sort of temporary occupancy by one person of the home of another can subject that other person to a search of his or her home without a search warrant. We begin our analysis by noting the " 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," and that "[a]bsent exigent circumstances, [the] threshold [of a home] may not reasonably be crossed without a warrant." *Payton v. New York,* 445 U.S. 573, 586, 590, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639 (1980).

In *Payton,* the Court held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect *lives* when there is reason to believe the suspect is within." *Id.* at 603, 100 S.Ct. at 1388 (emphasis added). However, in *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the Court made it equally clear that, absent exigent circumstances, an arrest warrant does not justify entry into a *third person's* home to search for the subject of the arrest warrant. A search warrant is needed to protect the rights of the homeowner. *Id.* at 206, 101 S.Ct. at 1644.

In formulating this rule, the Court examined the purposes to be served by the two kinds of warrants. The Court noted, "[W]hile an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ." *Id.* at 212-13, 101 S.Ct. at 1647-48. The Court noted that an arrest warrant "primarily serves to protect an individual from an unreasonable seizure," while a search warrant "safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." *Id.* at 213, 101 S.Ct. at 1648. In *Steagald,* the officers relied upon an arrest warrant to enter the home of a third person in which the subject of the arrest warrant was thought to be *Id.* at 212, 213, 101 S.Ct. at 1647, 1648. The Court explained that while the arrest warrant protected the interests of the suspect, "it did absolutely nothing to protect [the homeowner's] privacy interest in being free from an unreasonable invasion and search of his home." *Id.* at 213, 101 S.Ct. at 1648.

[1] In this case, we are faced with a situation which falls between *Steagald* and *Payton.* The officers had an arrest warrant for Albert Perez. They could have legally entered his home to seize him. Yet they used it to enter the home of his sister, Irma, on the apparent belief that Albert had been staying there. If Albert had been an actual co-resident in the apartment, the search would have been legal because the arrest warrant authorizes entry into the suspect's own home, even if that home is shared by others. *See United States v. Ramirez,* 770 F.2d 1458, 1460 (9th Cir. 1958). However, if Albert did not actually reside in the apartment, the search was illegal under *Steagald.*

The question presented to us by this case is what constitutes a person's "home" within the meaning of

Payton and *Steagald*. Here there was some evidence that Albert occasionally spent the night at Irma's home.[3] We must decide whether this temporary occupancy sufficed to make the apartment Albert's home as well so as to allow entry based on simply a warrant for Albert's arrest. The instructions to the jury stated that for purposes of determining Irma's Fourth Amendment rights, the search was legal if the police officers had reasonable cause to believe that Irma's apartment was "inhabited" by Albert at the time of the search. The court further instructed "[a]n inhabited residence is a place of occupancy, and is not restricted to a person's permanent home." The court thus conveyed a clear impression to the jury that a search warrant was not needed if Albert was temporarily staying at Irma's apartment.

[2] We find error in that instruction. Irma's Fourth Amendment rights revolve around her expectation of privacy in her own home. It is unlikely this expectation was lowered substantially when she allowed her brother to stay with her temporarily. She could not have considered Albert a co-resident simply because he occupied her apartment for a short while. The Fourth Amendment's protection against unreasonable searches in a person's home is not diminished by the mere presence of a guest in the home. *Payton* allows entry into the suspect's *actual* home to execute an arrest warrant for the suspect. *See Payton*, 455 U.S. at 603, 100 S.Ct. at 1388 ("[A]n arrest warrant . . . carries with it the limited authority to enter a dwelling in which the suspect *lives* when there is reason to believe the suspect is within." (Emphasis added)). The

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[3]Albert Perez testified in depositions that, prior to the incident, he typically spent the night at Irma's apartment two or three times a month for the purpose of babysitting her children. Irma Perez testified that, when Albert babysat her children overnight, he slept on a sofa, located downstairs in the living room.

Court made it very clear in *Steagald* that the Fourth Amendment does not allow entry into a third person's home without a search warrant. We would impermissibly diminish the protection offered by *Steagald* were we to hold that, for purposes of the *homeowner's* Fourth Amendment rights, the dwelling is the "home" of whoever happens to be staying there.

The defendants assert that "for Fourth Amendment purposes, staying somewhere for a short period of time may be temporarily equivalent to a home." Though this assertion might be true for some Fourth Amendment purposes, it has not force in the case at hand. The privacy interest protected by the Fourth Amendment is personal to the individual asserting it. *See Steagald*, 451 U.S. at 219, 101 S.Ct. at 1651. The cases cited by the defendants involve the constitutional rights of accused persons who temporarily stay in a place. *See, e.g., United States v. Grandstaff*, 813 F.2d 1353 (9th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 119, 98 L.Ed.2d 78 (1987); *Eng Fung Jem v. United States*, 281 F.2d 803 (9th Cir. 1960); *Feguer v. United States*, 302 F.2d 214, 249 (8th Cir.), *cert. denied*, 371 U.S. 872, 83 S.Ct. 123, 9 L.Ed.2d 110 (1962); *United States v. Bulman*, 667 F.2d 1374, 1382-84 (11th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982). The issue in those cases is whether suspects have a reasonable expectation of privacy in a place of temporary occupancy. For these purposes, a hotel room has been held to be the equivalent of a home. *See Eng Fung Jem*, 281 F.2d at 804-05; *Feguer*, 302 F.2d at 249; *Bulman*, 667 F.2d at 1384. Those cases have little to do with this one, where an actual resident of the home asserts Fourth Amendment rights. As the Supreme Court stated in *Steagald*, "The issue here . . is not whether the subject of an arrest warrant can object to the absence of a search warrant [for] . . . another person's home, but rather

whether the residents of that home can complain of the search." *Steagald*, 451 U.S. at 219, 101 S.Ct at 1651.

The privacy interests underlying Albert's and Irma's rights are markedly different. It may be true that if Albert's Fourth Amendment rights were at issue, Irma Perez's apartment might be considered his "residence," even though it was a very temporary place of occupancy. But it simply does not follow that, when analyzing *Irma's* constitutional rights, Albert must be considered a co-resident just because he spent the night there on occasion. On the contrary, when assessing whether the search violated Irma's rights, Albert must be considered a guest in her home if he stayed there only on a temporary basis.

A close reading of *Steagald* suggests that the circumstances in this case are similar to those in *Steagald*. In *Steagald*, the police received an anonymous phone call from an informant who stated that the subject of an arrest warrant — Ricky Lyons — might be reached at a certain phone number. The phone number was listed to a person other than Lyons. *See Steagald, sub nom United States v. Gaultney*, 606 F.2d 540, 543 (5th Cir. 1979) (discussion of facts). During the next four days the police had several other conversations with the informant in which the informant told them that Lyons was at the same location. *See id.* The facts imply that Lyons stayed at the residence for at least a few days, and the Supreme Court noted that the police officers believed Lyons was a guest at the house. *Steagald*, 451 U.S. at 213, 101 S.Ct. at 1648. The Supreme Court, however, did not view the house as Lyons' residence. Similarly, we do not view Irma Perez's apartment as Albert's residence even though he may have occasionally spent a night there.

[3] We hold that the trial judge erred in instructing the jury that, for the purposes of determining Irma Perez's Fourth Amendment rights, her residence could be

considered Albert's home even if he did not permanently reside there. Unless a jury finds that Albert was an actual co-resident of the apartment, and that the police had reasonable grounds for believing Albert was in the apartment at the time, *see Payton*, 445 U.S. at 603, 100 S.Ct. at 1388, the search was in violation of Irma Perez's constitutional rights. The Fourth Amendment right to be secure against warrantless searches within the home is too vital to justify entry without a search warrant to execute an arrest warrant upon a guest in the home, absent exigent circumstances.[4] *See Steagald*, 451 U.S. at 221, 101 S.Ct. at 1652.

Directed Verdict

[4, 5] In her second cause of action, Perez seeks to hold the City liable for her claimed constitutional injury because she attributes the illegal search of her apartment to inadequate training received by the City's officers. A city may be held liable under section 1983 for the constitutional violations of its police officers only if the violation resulted from a municipal "policy or custom." *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). We have held that a practice of gross negligence in training or supervision is a policy giving rise to municipal liability under section 1983. *Bergquist v. County of Cochise*, 806 F.2d 1364, 1370 (9th Cir. 1986). To prevail, the plaintiff must not only establish gross negligence in training but also must demonstrate an affirmative causal link between the inadequate training and the constitutional deprivation. *Id.* at 1369-70.

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[4]The defendants do not claim that there were any exigent circumstances in this case.

The district court granted a directed verdict in favor of the City, which we review *de novo*. *West America Corp. v. Vaughan-Bassett Furniture Co., Inc.*, 765 F.2d 932, 934 (9th Cir. 1985). The evidence must be viewed in the light most favorable to Perez, and all inferences must be drawn in her favor. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1219 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007, 105 S.Ct. 1874, 85 L.Ed.2d 166 (1985). A directed verdict is appropriate when the evidence permits only one reasonable conclusion as to the verdict. *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986).

[6] Applying these standards, we hold that the trial court erred in granting the directed verdict because the evidence could have permitted a finding of municipal liability. First, the City admitted in its answers to interrogatories that it had no written guidelines on searching a third person's home in which the subject of an arrest warrant is believed to be staying. Instead, the City simply stated that the law of search and seizure is taught on a periodic basis in the police department. We cannot eliminate the possibility that, at trial, a jury could have found the training program so inadequate as to constitute gross negligence on the part of the City. Similarly, we cannot rule out the possibility that such gross negligence, if proved, caused the incident. Two of the officers involved testified that they believed, as a result of their training and indoctrination as to department policy, that a search of a third-party home was legal if the subject of the arrest warrant had been staying temporarily at the residence. Viewing the evidence in the light most favorable to Perez, we believe a jury could have found the City liable for the incident. The district court erred in granting a directed verdict in favor of the City.

CONCLUSION

We reverse the district court's judgment and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX D

No. 86-6663
D.C.#CV 83-7492 JGD

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRMA JEAN PEREZ,
Plaintiff and Appellant,

VS.

WAYNE SIMMONS, et al.,
Defendants and Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court
Central District of California
Honorable John G. Davies, Judge presiding

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No. 86-6663
D.C.#CV 83-7492 JGD

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRMA JEAN PEREZ,
Plaintiff and Appellant,

VS.

WAYNE SIMMONS, et al.,
Defendants and Appellees.

PETITION FOR REHEARING

(F.R.A.P. 40)

I.

INTRODUCTION

In counsel's judgment, a material point of law was overlooked and not clearly addressed in this court's October 26, 1988 Opinion. That issue is the Fourth Amendment probable cause standard to be applied when determining whether a particular location is the home/residence of the subject of an arrest warrant.

In counsel's judgment, any retrial of this case on remand is fraught with uncertainty unless this court modifies its opinion to clarify the probable cause issue. This clarification is necessary because there is confusing and conflicting language on this issue in the Opinion, as now presented.

II

A HOMEOWNER'S FOURTH AMENDMENT RIGHTS ARE NOT VIOLATED WHEN POLICE HAVE AN OBJECTIVE REASONABLE BELIEF THAT THE SUBJECT OF AN ARREST WARRANT RESIDES IN THE HOME AND WAS THERE AT THE TIME OF THE SEARCH.

In this panel's opinion, it italicized those portions of the trial court's Fourth Amendment jury instruction that it believed caused the instruction to be an erroneous statement of the law. (P. 13434) As the court stated:

> "The difficulty we have with the instruction lies in the definition of an inhabited residence as merely a place of occupancy. This leaves the jury with the understanding that any sort of temporary occupancy by one person in the home of another can subject that other person to a search of his or her home without a search warrant."
> Page 13435

> "This court thus conveyed a clear impression to the jury that a search warrant was not needed if Albert was temporarily staying at Irma's apartment."
> Page 13437

This court did not question, nor discuss, the remaining language of the instruction set forth on Page 13434 of the opinion. In particular, the court did *not* criticize that portion of the instruction which read:

> "If you find that the police officers had reasonable cause to believe that the plaintiff's apartment was . . . at the time of the entry and the search, and they had reason to believe that Albert Perez was within the apartment, then the entry and search were constitutionally valid . . ."

In light of that silence, and the opinion's clear language as to what constitutes a "home" for purposes of a search pursuant to an arrest warrant, the defendants would therefore conclude that this panel also held, by implication, that the jury instruction would have been appropriate if written as follows:

> "If you find that the police officers had an objective, reasonable belief that the plaintiff's apartment was also the home or residence of Albert Perez at the time of the entry and search, and that they had reason to believe that Albert Perez was within the apartment at the time of the search, then the entry and search were constitutionally valid."

This conclusion is buttressed by the fact the plaintiff requested a jury instruction with similar language:

> "With respect to Claim #1, the defendant officers have the burden of proving the following facts:
>
> 1. . . .
>
> 2. That they entered plaintiff's home under the *reasonable good faith belief that Albert Perez* was not only there, but also that on that date, he *resided in the same apartment as plaintiff* . . ."
>
> (emphasis added)
> Instruction M, *see* Appellant's Opening Brief, p. 27.

This probable cause instruction requested by both the plaintiff and the defendants looks to the totality of circumstances and objective facts available to the law enforcement officers *at the time* of the search.

There is other language in this court's opinion, however, which conflicts with its silence on the "reasonable cause to believe" language and which appears to indicate that this court is suggesting a probable cause standard

that looks to the "actual" facts as determined *after* the search. For example, at Page 13436 the opinion states:

> "If Albert had been an actual co-resident in the apartment, the search would have been legal because the arrest warrant authorizes entry into the suspect's own home, even if that home is shared by others. . . . However, if Albert did not actually reside in the apartment, the search was illegal under *Steagald*."

In addition the opinion stated:

> "Payton allows entry into the suspect's *actual* home to execute an arrest warrant for that suspect."

– Page 13437

> "Unless a jury finds that Albert was an actual co-resident of the apartment . . . the search was in violation of Irma Perez's constitutional rights."

Page 13439

Defendants believe that the apparent conflict in this court's opinion needs to be clarified by the court adopting the probable cause standard requested by both plaintiff and defendants. We believe that there is sound legal precedent for this position.

In determining whether probable cause existed for the search of a home, based on an arrest warrant, the "reasonable believe" standard has been deemed appropriate by another circuit addressing the issue. *See U.S. v. DeParias,* 805 F.2d 1447, 1457 (11th Cir. 1986) (officers search of third party's home for defendants named in arrest warrant did not violate third party's Fourth Amendment rights where officers "reasonably believed" defendants resided in home and were there at time of search). *See also Llaguno v. Mingey,* 739 F.2d 1186, 1192 (7th Cir. 1984) ("Even assuming, arguendo, that the officers reasonably perceived the Llaguno home as the suspect's

home . . ."); *U.S. v. Clifford,* 664 F.2d 1090 (8th Cir. 1981); *U.S. v. Manley,* 632 F.2d 978 (2nd Cir. 1980); *O'Rourke v. City of Norman,* 640 F.Supp. 1451 (W.D. Okl 1986); (officers reasonably believed that home was daughter's residence). *See also, e.g., Washington v. Simpson,* 806 F.2d 192 (8th Cir. 1986).

The nation's leading scholar and commentator on Fourth Amendment search and seizure issues has argued for the probable cause standard suggested by defendants and approved in *DeParias.* In his treatise, Professor LaFave exhaustively examined the *Payton* and *Steagald* decisions, and the numerous issues raised by those opinions. He has specifically stated, with reference to the particular issue raised by this Petition, that:

> "With *Payton* requiring an arrest warrant for "entry into a suspect's home" to arrest and *Steagald* requiring a search warrant where the arrest entry is at the "the home of a third party", doubtless there will sometimes arise the question of which situation obtains in a particular case . . . when this issue is raised on a subsequent motion to suppress, objecting that a search warrant rather than an arrest warrant was required, surely it ought not be resolved on the basis of information *then* available showing the premises entered were not *in fact* the residence of the person sought to be arrested. Rather, in such circumstances the matter to be decided is whether the entering officers reasonably believed that the place entered was the residence of the person named in the arrest warrant, for were it otherwise the police would be caught in an incredible Catch 22 situation."
>
> LaFave, *Search and Seizure,* (2d Ed.) Section 6.1(b), pages 577-578.

Professor LaFave went on to clearly state that this standard did not suggest that any conclusion the police reached would in fact later be honored. As he stated, the reasonable belief requirement is an application of the traditional probable cause test, and would be measured by objective facts. *Id.,* page 578.

The "reasonable belief" probable cause standard approved by the 11th Circuit and also suggested by Professor LaFave, does not run counter to the United States Supreme Court's holding and language in either *Steagald* or *Payton.* As Professor LaFave stated with respect to *Steagald:*

> "... it is to be doubted that it could be said the agents had a reasonable belief Lyons resided there." *Id.*

Thus, under the reasonable standard, the search of *Steagald's* residence for Lyon would have been illegal because the officers had no objective facts to indicate that Lyon was anything but a visitor. Application of the standard to other reported cases would undoubtedly achieve the same result — i.e., an invalid search for lack of objective facts to support a reasonable belief of residence. *U.S. v. Underwood,* 717 F.2d 482 (9th Cir. 1983) (only objective facts were that suspect got drunk and was staying overnight); *see also, e.g., Bledsoe v. Garcia,* 742 F.2d 1237 (10th Cir. 1984); *U.S. v. Wickizer,* 633 F.2d 900 (6th Cir. 1980). It also appears that this circuit has previously applied a "reasonable belief" standard rather than the "actual facts" test proffered by this panel. In *U.S. v. Ramirez,* 770 F.2d 1458 (9th Cir. 1985), that panel went to great lengths to describe the objective facts known to Special Agent Pack before his search. Those facts included conversations with the landlord confirming that the DeParises did in fact live within the apartment. The panel held that Special Agent Pack had probable cause under

both *Steagald* and *Payton* to search, reasonably believing it was the home of the arrest warrant suspect and that he was within.

A "reasonable belief" standard is also consistent with *Payton.* In that decision, the U.S. Supreme Court did not discuss or adopt an "an actual facts" standard. The pertinent language merely provides that:

> "An arrest warrant . . . carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."
> *Payton,* 445 U.S. 573, 603 (1980)

The Supreme Court did not address the issue of what probable cause standard was to be applied with respect to the determination of whether a suspect is living in a dwelling. Its silence on that issue, combined only with the language "in which the suspect lives", does not justify the adoption of a new probable cause standard.

Historically, with respect to probable cause issues, the court has looked to the totality of circumstances and objective reasonable belief of the law enforcement officer at the time of the event, not thereafter. This is true with respect to the probable cause necessary for a search warrant based on information from an informant, *see Illinois v. Gates,* 426 U.S. 213 (1983); and the probable cause necessary for a misdemeanor arrest, *see Michigan v. DeFillippo,* 443 U.S. 31, 36 (1979); *McKenzie v. Lamb,* 738 F.2d 1005 (9th Cir. 1984). There is no express language in *Payton* suggesting that any different standard should be applied for residential searches involving arrest warrant suspects.

The Supreme Court has taken a common sense approach to defining probable cause.

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act."

Brinegar v. U.S., 338 U.S. 160, 175 (1949). It is inconsistent with that approach, and contrary to the very meaning of probable cause, to apply a test that looks only to the "actual facts" as they are collected and determined after the search. The Fourth Amendment protects only against "unreasonable" searches and seizures. It does not adopt or suggest an absolutist standard.

Defendants would argue that in determining the legality of a *Payton* search, a standard that looks to an officer's objective reasonable belief as to the residence of the warrant suspect, based on the totality of the circumstances at the time of the search, is the test most consistent with the spirit of the Fourth Amendment and Supreme Court precedent.

III

CONCLUSION

Defendants would respectfully request this court to grant the Petition or, in the alternative, to modify its opinion to clarify the issue presented by this petition.

Dated: November 7, 1988

Respectfully submitted,
STEVEN A. AMERIKANER,
City Attorney

By DAVID K. HUGHES
Assistant City Attorney
Attorney for all defendants,
for purpose of this Petition.

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-6663
D.C. No. CV-83-7492-JGD

IRMA JEAN PEREZ,
Plaintiff-Appellant,

v.

WAYNE A. SIMMONS; JAMES NALLS; THOMAS MILLER; MARK MESKE; and CITY OF SANTA BARBARA,
Defendants-Appellees.

ORDER

FILED DEC. 21, 1988
Cathy A. Catterson, Clerk
U.S. Court of Appeals

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: HUG, ALARCON, and KOZINSKI, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing filed by appellees on November 8, 1988.

The petition for rehearing is hereby DENIED.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 13, 1989, I served the within Petition for Writ of Certiorari in re: "Wayne A. Simmons, James Nalls, Thomas Miller, Mark Meske, City of Santa Barbara vs. Irma Jean Perez" in the United States Supreme Court, October Term 1988 No.....;

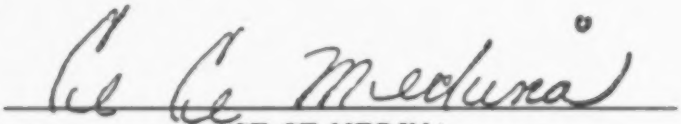
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John M. Sink
1114 State Street, Suite 211
Santa Barbara, California 93101

All parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on February 13, 1989, at Los Angeles, California.



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